

1  
2  
3  
4  
5  
6  
7 **UNITED STATES DISTRICT COURT**  
8 **WESTERN DISTRICT OF WASHINGTON**  
9 **AT TACOMA**

10 STATE OF WASHINGTON,

11 Plaintiff,

12 v.

13 THE GEO GROUP, INC.,

14 Defendant.

Case No.: 3:17-cv-05806-RJB

15 UGOCHUKWU GOODLUCK  
16 NWAUZOR, FERNANDO AGUIRRE-  
17 URBINA, individually and on behalf of all  
18 those similarly situated,

19 Plaintiff,

20 v.

21 THE GEO GROUP, INC., a Florida  
22 corporation,

23 Defendant.

Case No.: 3:17-cv-05769-RJB

**THE GEO GROUP, INC.'S RENEWED  
MOTION FOR JUDGMENT AS A  
MATTER OF LAW**

**NOTE ON MOTION CALENDAR:**

Date: June 14, 2021

24 The GEO Group, Inc. ("GEO"), pursuant to Fed. R. Civ. P. 50 and at the close of all  
25 evidence, hereby files its Renewed Motion for Judgment as a Matter of Law and Memorandum of  
26 Law in Support and against Plaintiffs State of Washington ("State") and Nwauzor et al ("Private  
27 Plaintiffs") (collectively "Plaintiffs"). As grounds therefore, GEO states the follows:

///

///

## I. INTRODUCTION

GEO reasserts each of the arguments raised in the Motion for Judgment as a Matter of Law [D.E. 366] filed at the close of Plaintiffs' case. This renewed motion supplements that previous motion by discussing the evidence and law submitted during Defendant's case supporting its affirmative defenses.

## II. GEO'S INTERGOVERNMENTAL IMMUNITY DEFENSE

Under the evidence, no reasonable jury could find that the Washington Minimum Wage Act ("WMWA") does not impermissibly discriminate against the federal government and its contractor, GEO. The Plaintiffs have not presented any evidence to the contrary.

During the testimony of Joshua Grice, the employment standard program manager of the State of Washington Department of Labor and Industries ("L&I"), the previous official Administrative Policy of L&I (the "Administrative Policy"), regarding the enforcement of the WMWA, was introduced into evidence as Exhibit A-308. Mr. Grice testified that the previous version was substantially the same as the current version. After Mr. Grice testified, GEO obtained the *newly released* administrative guidance that was not previously disclosed by the state. This new policy reinforces GEO's claim to intergovernmental immunity. The Administrative Policy explains (at Section 5(k)) that:

"Residents, inmates, or patients of state, county or municipal correctional, *detention*, treatment or rehabilitative institution assigned by facility officials to work on facility premises *for a private corporation* at rates established and paid for by public funds *are not employees of the private corporation* and *would not be subject to the MWA*"

See **Exhibit A**, ES.A.1 Minimum Wage Act Applicability, Last revised December 29, 2020. The administrative guidance released by the Department of Labor and Industries in December 2020 makes plain that so long as detainees perform work on the premises where they are held and are paid public funds, they are not employees for purposes of the Minimum Wage Act. But that policy goes even further. While Mr. Grice testified that under the prior version provided (at Section 5(K))

1 that inmates of state facilities are exempt from the minimum wage law when they are assigned by  
 2 facility officials to work for private corporations at the facility, he did not explain that the current  
 3 version of that Administrative Policy (revised 12/29/20) expands that exemption for private  
 4 corporation work to "**Residents**, inmates or patients of state, county or municipal correctional,  
 5 **detention**, treatment or rehabilitative institution[s]"(emphasis added). The current version is  
 6 attached as **Exhibit A**.

7 The present lawsuit alleges that GEO, a private corporation, uses residents of its detention  
 8 facility to do work on the facility premises at rates established and paid for by public funds. The  
 9 un rebutted testimony established that the VWP payments are a pass through from ICE (using  
 10 taxpayer dollars) to the detainees. Thus the **exact** scenario permitted by the regulation for state  
 11 detainees, is denied to ICE's federal detainees.

12 Under the intergovernmental immunity doctrine, "a state regulation is invalid only if it [1]  
 13 regulates the United States directly or [2] discriminates against the Federal Government or those  
 14 with whom it deals." *See North Dakota v. United States*, 495 U.S. at 435 (1986). Because "a [state]  
 15 regulation imposed on one who deals with the Government has as much potential to obstruct  
 16 governmental functions as a regulation imposed on the Government itself," intergovernmental  
 17 immunity may apply to state regulation that affects government contractors, *see id.* at 438; *see also*  
 18 *Boeing Co. v. Movassaghi*, 768 F.3d 832, 842-43 (9th Cir. 2014). ("The federal government's  
 19 decision to hire Boeing to perform the cleanup rather than using federal employees does not affect  
 20 our immunity analysis on [the grounds of discrimination]. When the state law is discriminatory, a  
 21 private entity with which the federal government deals can assert immunity.").

22 The issue before the court is whether the WMWA discriminate against the federal  
 23 government. If the Detainee exception in 49.46.10(3)(k) of the WMWA applies only to individuals  
 24 in the State's custody, and not those in federal custody, the provision is discriminatory. *See Dawson*  
 25 *v. Steager*, 139 S. Ct. 698 (2019) (when statute allowed individuals to reduce their taxable income  
 26 by the amount of state police pensions but did not also exempt federal law enforcement pensions,  
 27 it was impermissibly discriminatory). Here, the state argues that the WMWA applies to individuals

in federal ICE detention at the NWIPC, but not to individuals in state detention. The State's administrative policy would explicitly exempt the operation of the VWP at a private facility operated by the State from the WMWA; it must therefore except the federally operated GEO facility as well. The established facts place this case squarely in the preemption scenario described by the Supreme Court *Dawson* because an exemption applied to state facilities is not applied to federal ones.

GEO has now introduced un rebutted evidence that the state can and does take full advantage of these statutory exceptions to the detriment of the federal government and GEO. The testimony of Byron Eagle established that the Special Commitment Center houses civil detainees, who participate in a work program which mirrors the VWP, and receive sub-minimum wages.

Special Commitment Center	Northwest ICE Processing Center
Administrative confinement	Administrative confinement
Subminimum wage stipend	Subminimum wage stipend
Tasks include cleaning, laundry, and meal preparation.	Tasks include cleaning, laundry, and meal preparation.
Paid employee officers supervise safety and security and work alongside confined individuals.	Paid employee officers supervise safety and security and work alongside confined individuals.
Meaningful opportunities	Meaningful opportunities.

Similarly, Sarah Systma testified about Correctional Industries which pays subminimum wages in prison work programs which can benefit private companies.

Correctional Industries	Northwest ICE Processing Center
Population held under state governmental authority.	Population held under federal Governmental authority
Subminimum wage "gratuity"	Subminimum wage stipend
Tasks include cleaning, laundry, and meal Preparation	Tasks include cleaning, laundry, and meal Preparation
Paid employee officers supervise safety and security and work alongside confined individuals.	Paid employee officers supervise safety and security and work alongside confined individuals.

As noted in the Court's prior Order [D.E. 322]:

The Court is mindful that, in the Order Denying Defendant The GEO Group, Inc.'s Motion for Summary Judgment on Plaintiff's First Cause of Action (Dkt 162) at Page 9, Line 11, it inartfully

1 stated “The doctrine of intergovernmental immunity does not  
 2 shield Defendant from application of the MWA.” That sentence  
 3 should have read, “The doctrine of intergovernmental immunity  
 4 has not been shown, on the motion for summary judgment, to  
 5 shield Defendant from application of the Minimum Wage Act.”  
 6 The Court’s intent, hopefully, was made clear by the Order  
 7 Denying Defendant GEO’s Motion for Reconsideration of Order  
 8 Denying Motion for Summary Judgment on First Cause of  
 Action (Dkt. 165) at Page 2, Line 18: “We should keep in mind  
 that these issues are raised here in a summary judgment motion.  
 There are, at least, material issues of fact that prevent summary  
 judgment. Exactly what issues and what instructions will be  
 presented to a jury remain to be seen.” The application of the  
 defense of intergovernmental immunity remains an undecided  
 issue.

9 The evidence has now been presented, and is uncontroverted as to the essential facts of the State’s  
 10 discrimination – including in the plain language of its administrative guidance. The State of  
 11 Washington can and does exempt itself under the WMWA from the restrictions that it seeks to  
 12 enforce against GEO. This court should enter a judgment as a matter of law in GEO's favor as to  
 13 the intergovernmental immunity defense.

### 14 **III. GEO’S DERIVATIVE SOVEREIGN IMMUNITY DEFENSE**

15 In denying GEO’s Motion for Judgment as a matter of law at the close of Plaintiff’s  
 16 evidence, the Court stated that GEO’s affirmative defenses had not been proven. The essential  
 17 facts of sovereign immunity have now been proven and the Plaintiffs have not offered evidence to  
 18 the contrary. GEO performs work “authorized and directed” by the federal government and  
 19 “simply performed as the Government directed” in operating the VWP. *Campbell-Ewald Co. v.*  
 20 *Gomez*, 577 U.S. 153, 167 (2016). The contract between GEO and ICE, and the PBNDS which  
 21 GEO is contractually bound to follow, require all the elements of the VWP which Plaintiffs argue  
 22 create an employer-employee relationship. The contract, the PBNDS, and GEO’s obligations are  
 23 not disputed in the evidence. To the extent that GEO had some discretion, for example in deciding  
 24 how many positions to make available in the kitchen, those limited discretionary elements do not  
 25 change the nature of the relationship between GEO and the detainees participating in the VWP.  
 26 The evidence also establishes that GEO cannot hire detainees or treat them as employees under the  
 27 explicit requirements of its contract with ICE. Thus, at the close of the evidence, the Court should

1 find that there is no legally sufficient evidence to avoid GEO's sovereign immunity defense.

2 **CONCLUSION**

3 For the above stated reasons, GEO respectfully asks the Court to enter judgment as a matter  
4 of law in its favor.

5 Respectfully submitted, this 14th day of June, 2021.

6 By: s/ Adrienne Scheffey

7 **AKERMAN LLP**

8 Adrienne Scheffey (Admitted *pro hac vice*)

9 1900 Sixteenth Street, Suite 1700

10 Denver, Colorado 80202

11 Telephone: (303) 260-7712

12 Facsimile: (303) 260-7714

13 Email: adrienne.scheffey@akerman.com

14 By: s/ Lawrence D. Silverman

15 **AKERMAN LLP**

16 Lawrence D. Silverman (Admitted *pro hac vice*)

17 98 Southeast Seventh Street, Suite 1100

18 Miami, Florida 33161

19 Telephone: (305) 982-5666

20 Facsimile: (305) 374-5905

21 Email: lawrence.silverman@akerman.com

22 By: s/ Joan K. Mell

23 **III BRANCHES LAW, PLLC**

24 Joan K. Mell, WSBA #21319

25 1019 Regents Boulevard, Suite 204

26 Fircrest, Washington 98466

27 Telephone: (253) 566-2510

Facsimile: (281) 664-4643

Email: joan@3brancheslaw.com

*Attorneys for Defendant The GEO Group, Inc.*

**PROOF OF SERVICE**

I hereby certify on the 14th day of June, 2021, pursuant to Federal Rule of Civil Procedure 5(b), I electronically filed and served the foregoing **THE GEO GROUP, INC.'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW** via the Court's CM/ECF system on the following:

**OFFICE OF THE ATTORNEY GENERAL**

Marsha J. Chien  
Andrea Brenneke  
Lane Polozola  
Patricio A. Marquez  
800 Fifth Avenue, Suite 2000  
Seattle, Washington 98104

*Attorneys for Plaintiff State of Washington*

**SCHROETER GOLDMARK & BENDER**

Adam J. Berger, WSBA #20714  
Lindsay L. Halm, WSBA #37141  
Jamal N. Whitehead, WSBA #39818  
Rebecca J. Roe, WSBA #7560  
810 Third Avenue, Suite 500  
Seattle, Washington 98104  
Telephone: (206) 622-8000  
Facsimile: (206) 682-2305  
Email: hberger@sgb-law.com  
Email: halm@sgb-law.com  
Email: whitehead@sgb-law.com  
Email: roe@sgb-law.com

**THE LAW OFFICE OF R. ANDREW FREE**

Andrew Free (Admitted *Pro Hac Vice*)  
P.O. Box 90568  
Nashville, Tennessee 37209  
Telephone: (844) 321-3221  
Facsimile: (615) 829-8959  
Email: andrew@immigrantcivilrights.com

**OPEN SKY LAW PLLC**

Devin T. Theriot-Orr, WSBA #33995  
20415 72nd Avenue S, Suite 100  
Kent, Washington 98032  
Telephone: (206) 962-5052  
Facsimile: (206) 681-9663  
Email: devin@openskylaw.com

1 **MENTER IMMIGRATION LAW, PLLC**

Meena Menter, WSBA #31870  
2 8201 164th Avenue NE, Suite 200  
Redmond, Washington 98052  
3 Telephone: (206) 419-7332  
Email: meena@meenamenter.com

4 *Attorneys for Plaintiffs*

5  
6  
7 s/ Nick Mangels  
Nick Mangels